



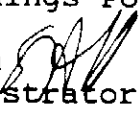
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

JUN 21 1994

OFFICE OF  
ENFORCEMENT

MEMORANDUM

SUBJECT: Parallel Proceedings Policy

FROM: Steven A. Herman   
Assistant Administrator

TO: All Assistant Administrators  
All Regional Administrators  
All Regional Counsels  
General Counsel

This is the Environmental Protection Agency's revised policy on initiating and maintaining parallel enforcement proceedings.<sup>1</sup>

Most statutes administered by EPA include both criminal and civil enforcement authorities, as well as information gathering and inspection provisions. The United States has multiple duties and goals in carrying out the mandates of federal environmental laws, which often can be achieved most effectively through use of several investigative and enforcement options. Thus, it is in the public interest that EPA retain maximum flexibility in the use of its options, consistent with all legal requirements.

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<sup>1</sup>The following policies are hereby superseded:

Memo, Revised EPA Guidance for Parallel Proceedings, from Edward E. Reich, Acting Assistant Administrator, June 21, 1989; Guidelines on Investigative Procedures for Parallel Proceedings (attachment to 6/21/89 Memo), prepared by Paul R. Thomson, Jr., Deputy Assistant Administrator for Criminal Enforcement;

Memo, Procedures for Requesting and Obtaining Approval of Parallel Proceedings, from Edward E. Reich, Acting Assistant Administrator for Enforcement, June 15, 1989; and

Memo, Supplement to Parallel Proceedings Guidance and Procedures for Requesting and Obtaining Approval of Parallel Proceedings, from James M. Strock, Assistant Administrator for Enforcement, July 18, 1990.

This policy applies in conjunction with other Agency guidances, where applicable, such as those on case screening, participation in grand jury investigations, and referrals.



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As used in this policy, the term "proceedings" includes enforcement actions (both investigation and litigation stages) as well as use of information gathering and entry authorities. "Parallel" means simultaneous or successive civil, administrative and criminal proceedings, against the same or related parties, dealing with the same or related course of conduct.

### Principles

1. It sometimes is necessary, appropriate, and a reasonable use of resources to bring a civil (administrative or judicial) enforcement action at the same time as an existing or potential criminal investigation or prosecution concerning the same or a related matter. When, in the course of considering appropriate enforcement options, EPA determines that injunctive relief is necessary to obtain compliance with the law or to impose remedial measures, the pendency of a criminal proceeding is not necessarily a sufficient reason to fail to seek appropriate relief.<sup>2</sup>

2. The government legitimately may seek civil penalties which are punitive (i.e., effect retribution or deterrence). On the other hand, punitive civil penalties may have implications under the Double Jeopardy Clause if they are assessed prior, or subsequent, to a criminal prosecution of the same person for the same violations. Although case law has established that civil penalties which are significant in amount can be assessed without implicating Double Jeopardy concerns, it is preferable to avoid the assessment of federal civil penalties against persons who are likely to be subject to subsequent federal criminal prosecution for the same violations.

3. When an environmental criminal matter is investigated by a grand jury, and EPA personnel obtain access to grand jury information, EPA personnel must take care not to violate the secrecy obligation imposed by law, or to use grand jury information for improper purposes. Although the issue of grand jury secrecy can arise in any criminal case, extra care should be taken in the parallel proceedings context.

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<sup>2</sup>In some cases, it may be appropriate to delay initiation of a civil enforcement action, and/or to seek a remedial order as a condition of probation, or as a condition of the plea agreement, in the criminal action. These decisions must be made on a case by case basis, taking into account the complications which inevitably arise in parallel proceedings (such as defense attempts to use civil discovery to gain information about a criminal investigation), as well as other case-specific considerations (such as the need to prevent persons from learning that they are targets of criminal investigation) and weighing them against the need for the civil action.

4. EPA's regulatory inspections (administrative searches) must be objectively reasonable, and properly limited within the scope of the authorizing statute and warrant. As in every situation, the government has a duty to act in good faith, and must ensure that its use of administrative entry authorities is properly within the mandates of the Fourth Amendment.

5. EPA's information-gathering authorities must be used in accordance with the authorizing statutory provisions. There is no general legal bar to using administrative mechanisms for purposes of investigating suspected criminal matters, unless otherwise specified in the authorizing statute. However, the government must not intentionally mislead a person as to the possibility of use in the criminal enforcement context of information provided in response to such requests, in such a way as to violate the Fifth Amendment Due Process Clause or the Self-Incrimination Privilege.

#### Procedures

1. The Regional Counsel and the Special Agent in Charge of the Criminal Investigation Division must concur in the initiation (or continuance) of a civil enforcement proceeding (administrative or judicial), when a criminal proceeding is pending or contemplated as to the same or a related matter.<sup>3</sup> During the pendency of any such civil action, the Regional Counsel and the SAC should consult on a continuing basis, in order to avoid undue duplication of effort and interference by one action with the other.<sup>4</sup> As with other aspects of the case screening process, the regions (and HQ offices, where applicable) have flexibility in designing specific procedures to implement these requirements, and issues may be brought to the attention of the Assistant Administrator where agreement cannot be reached.

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<sup>3</sup>If the civil enforcement action contemplated is a judicial (rather than an administrative) one, Agency referral policy continues to require that the request for referral of a parallel proceeding to the Department of Justice be routed through EPA-HQ, for Assistant Administrator approval. In other words, the "direct referral" policy does not apply to parallel proceedings. Note also that DOJ policy affects the Agency's ability to pursue a civil judicial action that is related to a pending criminal investigation.

<sup>4</sup>When an EPA Headquarters office has the lead in an enforcement matter, both the Enforcement Counsel who has the civil case, and the Director of the Office of Criminal Enforcement (or delegate), must concur in the civil action. These persons should consult on a continuing basis.

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2. When a parallel civil action is brought, a claim for civil penalties may be filed, as necessary, to avoid claim-splitting or statute-of-limitation problems. Normally, however, a civil penalty claim should be stayed (not assessed or collected) as to a person who is a target of criminal investigation, until the criminal proceeding is concluded as to that person.

3. In the parallel proceedings context, open communication should be maintained between EPA personnel assigned to the civil-enforcement or information-gathering matter and those assigned to the criminal case, in a manner consistent with the legitimate confidentiality and grand jury secrecy needs of the criminal enforcement program.<sup>5</sup> However, information relating to matters occurring before a grand jury should not be revealed without prior consultation with the attorney for the government (usually a Department of Justice attorney).

4. Prior to any use of EPA's statutory information-gathering or entry authorities to gather evidence of suspected criminal activity, the Regional Counsel (or the OCE Assistant Director for Legal Affairs, for HQ cases) should be consulted, to ensure that constitutional requirements are met.

#### Reservation of Rights

This policy provides internal Environmental Protection Agency guidance. It is not intended to, and does not, create any rights or privileges, substantive or procedural, which are enforceable by any party. No limitations are hereby placed on otherwise lawful prerogatives of the Environmental Protection Agency.

cc: All Office of Enforcement and Compliance Assurance Personnel

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<sup>5</sup>Note that it is good professional practice for enforcement personnel to carefully document the sources of information received and the persons with whom information is shared, whether there is a parallel proceeding or not.